IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-465

NAVARRO SAVINGS ASSOCIATION,

Petitioner,

v.

LAWRENCE F. LEE, JR., BERT A. BETTS, ROBERT M. GREEN, WILLIAM A. LANE, JR., JAMES B. McINTOSH, FREDERICK H. SCHROEDER, JOHN W. YORK and JACK H. QUARITIUS,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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REFERENCE TO PRIOR DECISIONS

The opinion of the District Court of the United States for the Northern District of Texas, Honorable William M. Taylor, Judge Presiding in Cause No. 3-74-1231-C entitled "Lawrence F. Lee, Jr., et al. v. Navarro Savings Association" is found at 416 F.Supp.

1186 (N.D. Tex. 1976).

The opinion of the United States Court of Appeals for the Fifth Circuit in Cause No. 76-3550, likewise entitled, is reported at 597 F.2d 421 (5th Cir. 1979).

As required by Supreme Court Rule 23(i), true and correct copies of the opinions of the Courts below are appended hereto.

STATEMENT OF JURISDICTION

The Supreme Court of the United States has jurisdiction of this cause as shown by the following:

1. The judgment of the United States Court of Appeals for the Fifth Circuit as to which review is sought is dated and was entered of record on June 18, 1979.

2. The Suggestion for Rehearing En Banc filed by Petitioners (Appellees in the Court below) was denied August 1, 1979. By order entered August 15, 1979, the United States Court of Appeals for the Fifth Circuit stayed the issuance of its mandate pending Petition for Writ of Certiorari to this Court through and including September 16, 1979; and subsequent order extended to September 21, 1979.

3. The Supreme Court of the United States has jurisdiction to review the judgment in question by Writ of Certiorari pursuant to 28 U.S.C. §1254(1).

ISSUE PRESENTED FOR REVIEW

Whether for purposes of the diversity jurisdiction of the District Courts of the United States, the citizenship

of a real estate investment trust should be determined with reference to the citizenship of its trustees rather than that of its beneficial shareholders by application of "real party in interest" rules or for any other reason.

STATUTORY PROVISIONS CONSTRUED

This case involves construction of the provisions of 28 U.S.C. §1332(a) which provides as follows:

> §1332. Diversity of citizenship; amount in controversy; costs.
>
> (a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between–
>
> (1) citizens of different States:
>
> (2) citizens of a State and citizens or subjects of a foreign state;
>
> (3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and
>
> (4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.

STATEMENT OF THE FACTS

This case was originally brought in the State District Court of Texas, 116th Judicial District sitting at Dallas County, Texas in March, 1974 by Lawrence F. Lee, Jr., Bert A. Betts, Robert M. Green, William A. Lane, Jr., James B. McIntosh, Frederick H. Schroeder, John W.

York and Jack H. Quaritius, each of whom are Trustees of Fidelity Mortgage Investors, a real estate investment trust, with its principal offices at Jacksonville, Florida, against the Petitioner, Navarro Savings Association, as Defendant.[1] The substantive cause of action was for Navarro's alleged fraud and breach of contract in the issuance and dishonor of a loan commitment letter by Navarro, a corporate citizen of Corsicana, Navarro County, Texas.

Following evidentiary proceedings and the resulting transfer of the case to the State District Court at Navarro County, Texas, the Trustees dismissed the State action and refiled in the United States District Court for the Northern District of Texas. The Plaintiff-Trustees brought the action in their capacity as Trustees only and asserted the existence of federal diversity jurisdiction.

Upon Navarro's motion, the question of lack of complete diversity was raised; and the District Court thereupon granted leave to the Trustees to amend their complaint. Although the Amended Complaint alleged three additional grounds of jurisdiction as alternatives to diversity, the District Court dismissed the Amended Complaint, concluding that the Trustees had failed to sustain their burden of establishing jurisdiction. Specifically, by his memorandum opinion and order, the Court below determined that diversity jurisdiction did not exist in that the residence of the shareholders of FMI—as opposed to that of the Trustees only—was controlling. The District Court further determined that the Trustees had failed to establish any of the other

[1] For clarity, reference to the Petitioner will be made by the name of "Navarro" and reference to the Respondents will be by the name of "Trustees." Reference to Fidelity Mortgage Investors as an entity will be as "FMI."

alleged bases for Federal jurisdiction.[2]

On appeal to the United States Court of Appeals for the Fifth Circuit, the Trustees emphasized, as they did in the District Court, the question of diversity jurisdiction. The Court of Appeals reversed, by a 2-1 majority, holding that the Trustees were "the real parties in interest" and, their citizenship being completely diverse to that of Navarro, jurisdiction under 28 U.S.C. §1332(a) was proper. In its opinion, the panel majority focused only on the diversity jurisdiction issue and, concluding that the District Court had erred in dismissing the case, did not reach the remaining grounds for Federal jurisdiction.

In a dissenting opinion, Judge Vance concluded that "a party cannot unilaterally confer subject matter jurisdiction on a Federal Court by declaring who is to represent the trust in legal actions."

It is respectfully submitted that the opinion of the majority of the Court of Appeals in this cause is in direct conflict with the opinion of the Supreme Court in *United Steelworkers v. R. H. Bouligny, Inc.*, 382 U.S. 145, 86 S.Ct. 272, 16 L.Ed.2d 217 (1965) and *Morrissey v. Commissioner of Internal Revenue*, 296 U.S. 344, 56 S.Ct. 289, 80 L.Ed. 263 (1935). This is a case of first impression in this Court and clearly

[2] The other grounds alleged were the Securities Act of 1934; class action under Rule 23.2 of the Federal Rules of Civil Procedure; and Federal Bankruptcy Act jurisdiction, FMI having become a debtor-in-possession subsequent to the filing of the Original Complaint. The District Judge determined that the claim under the 1934 Act was frivolous; that the class action procedure was unavailable; and that Navarro had not consented to Bankruptcy Act jurisdiction.

overrules the decisions of the district courts of several circuits in *Larwin Mortgage Investors v. River Drive Mall, Inc.*, 392 F.Supp. 97 (S.D. Tex. 1975); *Jim Walter Investors v. Empire-Madison, Inc.*, 401 F.Supp. 425 (N.D. Ga. 1975); *Chase Manhattan Mortgage & Realty Trust v. Pendley*, 405 F.Supp. 593 (N.D.Ga. 1975); *Lincoln Associates, Inc. v. Great American Mortgage Investors*, 415 F.Supp. 351 (N.D. Tex. 1976); *Carey v. U.S. Industries, Inc.*, 414 F.Supp. 794 (N.D. Ill. 1976); *Heck v. A. P. Ross Enterprises, Inc.*, 414 F.Supp. 971 (N.D. Ill. 1976); *Independence Mortgage Trust v. White*, 446 F.Supp. 120 (D. Ore. 1978); *National City Bank v. Fidelco Growth Investors*, 446 F.Supp. 124 (E.D. Pa. 1978).

So far as is known to counsel for Navarro, the only decision of any other Circuit concerning this issue is *Riverside Memorial Mausoleum v. UMET Trust*, 581 F.2d 62 (3rd Cir. 1978) wherein the Court denied diversity jurisdiction. Accordingly, the decision of the Court of Appeals in the instant case is contrary to all prior cases in which the issue of citizenship of an unincorporated business association has been presented. Most importantly, it is respectfully suggested that the opinion of the appeals Court majority in this cause is, as observed by its dissent, an extension of diversity jurisdiction to a category of litigants not previously contemplated by Congress.

For the reasons stated, it is respectfully suggested that this cause merits consideration by the Supreme Court of the United States and that upon due consideration, the decision of the majority of the Court of Appeals in Cause No. 76-3550 should be reversed.

ARGUMENT AND AUTHORITIES

ISSUE: WHETHER THE CITIZENSHIP OF AN UNINCORPORATED BUSINESS ASSOCIATION–A "REAL ESTATE INVESTMENT TRUST"–FOR THE PURPOSES OF THE DIVERSITY JURISDICTION OF THE DISTRICT COURTS OF THE UNITED STATES, IS THAT OF EACH OF ITS SHAREHOLDERS.

SUMMARY OF THE ARGUMENT

The District Court properly concluded that it lacked diversity jurisdiction because the citizenship of FMI was not, as Trustees contended, determined by either the place of business of FMI or the residence of the Trustees selected as Plaintiffs. Rather, as an unincorporated business association or "Massachusetts Business Trust," the citizenship of FMI must be determined by the residence of each of its shareholder beneficiaries.

FMI, as a "business trust" has as its object the conduct of business and sharing of the profits as distinguished from the traditional express trust the object of which is to hold and conserve particular property with incidental powers of management conferred upon its Trustees. FMI's counsel stipulated in the District Court that at all material times some of its beneficial interest owners were residents of Texas. Accordingly, FMI lacks the requirement of complete diversity required by 28 U.S.C. §1332(a).

The Court of Appeals majority, in analyzing the organic composition of FMI in the context of diversity jurisdction analogized to the "real parties in interest." This analysis incorrectly focused upon those provisions

of the trust instrument governing the relationship between the shareholders and the Trustees. The emphasis upon the Trustees' extensive control over the day to day management of the REIT s assets is misplaced. Analysis of the degree of control vested in the Trustees is relevant for determining whether personal liability may be imposed upon the shareholders of the Trust. The similarities between the "business trust" and the corporate form of enterprise, i.e., transferability of interests, continuity of business activities, delegated management, etc., more than outweigh the similarities between this business form and the conventional trust.

POINTS OF ARGUMENT

A real estate investment trust is an unincorporated business association rather than an express trust; accordingly, the residence of each of its shareholder beneficiaries is determinative upon the issue of citizenship for diversity purposes pursuant to 28 U.S.C. §1332(a).

Fidelity Mortgage Investors ("FMI") is by its own admission a profit-oriented "business trust," the principal occupation of which is the investment of the trust capital in mortgage loans on real property. According to the declaration of trust which created FMI, apparently much of the day-to-day business of the trust is managed by its Board of Trustees, while the shareholder beneficiaries have the authority to elect and remove trustees and to approve any sale or other disposition of assets comprising 50% or more of the trust estate. Admittedly, FMI has many of the attributes of an incorporated

entity such as a centralized management, transferability of shares, continuity of business, etc. Were FMI a corporation or an entity which should be treated as a corporation, and considering its principal place of business to be without the State of Texas, it is clear that diversity of citizenship would exist with the Texas Defendant, Navarro Savings Association.[3] However, both here and in the Courts below the Trustees have disclaimed any theory of corporate enterprise choosing instead to rely on the theory that the Trustees, through their inherent powers under the declaration of trust, are the "true parties in interest" as such term is defined in Rule 17 of the Federal Rules of Civil Procedure.[4]

Relying upon the case of *Larwin Mortgage Investments v. Riverdrive Mall, Inc.*, 392 F. Supp. 97 (S.D.Tex. 1975) and other cases which are discussed infra, the District Court concluded that the citizenship of FMI was properly determined with reference to the residence of each of its shareholder beneficiaries. In that the Trustees failed to sustain their burden to plead and prove[5] the absence of any Texas shareholders in FMI, (and, in fact, stipulated their existence) the presence of whom would destroy the complete diversity requirement of 28 U.S.C. §1332(a), diversity jurisdiction was lacking.[6]

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[3] 12 C. Wright, A. Miller and E. Cooper, Federal Practice and Procedure §3630 at 836 (1975).

[4] Memorandum Opinion and Order of Judge Taylor at footnote 1; Appellants' Brief in the Court of Appeals at page 5.

[5] Ray v. Bird and Son, 519 F.2d 1081 (5th Cir. 1975).

[6] Strawbridge v. Curtiss, 3 Cranch (7 U.S.) 267 (1806); Shainwald v. Lewis, 108 U.S. 158, 2 S.Ct. 385, 27 L.Ed. 691 (1883); Mas v. Perry, 489 F.2d 1396, reh.den. 492 F.2d 1242 (5th Cir. 1974), cert.den. 419 U.S. 842, 95 S.Ct. 74, 42 L.Ed.2d 70.

In *Larwin*, Judge Cox considered the precise issues presented in this case. Larwin Mortgage Investments was a California real estate investment trust which advanced funds for interim financing of a construction project in Laredo, Texas. The shares of beneficial interest were publicly held by several thousand shareholders and traded on the New York Stock Exchange. The declaration of trust establishing Larwin provided that:

> "While legal title to the trust assets rests exclusively in the trustees, the shareholders (holders of beneficial interest) are empowered to remove trustees, with or without cause, and fill trustee vacancies. Additionally, shareholders' consent must be obtained before the consummation of any transaction which involves the disposition of more than 50% of the trust estate." [Footnotes omitted] 392 F.Supp. at 100.

The Court considered Larwin's two contentions: (i) that it was a juridical entity in and of itself, whose citizenship was California; and (ii) alternatively, that as an active trust, only the residence of its trustees should be considered for diversity purposes. 392 F.Supp. at 98.

Judge Cox determined that the decision of the United States Supreme Court in *United Steelworkers v. R. H. Bouligny, Inc.*, 382 U.S. 145, 86 S.Ct. 272, 15 L.Ed.2d 217 (1965) effectively foreclosed judicial recognition of unincorporated associations as juridical entities for diversity purposes.[7] The Court then determined that the characteristics of Larwin as a business organization—particularly the rights of the beneficial interest holders to approve certain transactions and to elect or remove the manager-trustees—predominated over its owtward appearance as a conventional trust. The Court analogized to the question before the United States Supreme Court in *Morrissey v. Commissioner*, 296 U.S. 344, 56 S.Ct. 289, 80 L.Ed. 263 (1935) where it was observed that:

> "The object [of the business trust] is not to hold and conserve particular property, with incidental powers, as in the traditional type of trusts, but to provide a medium for the conduct of business and sharing its gains." 296 U.S. at 357, 56 S.Ct. at 295.

Concluding that it is the responsibility of Congress to change the citizenship status of such trusts for diversity purposes, Judge Cox dismissed Larwin's alternative contention.

In *National City Bank v. Fidelco Growth Investors*, 446 F.Supp. 124 (E.D.Pa. 1978) Judge Luongo reviewed all the relevant authorities and concluded that the reasoning applied in *Larwin, supra*, was appropriate. In *Fidelco*, the REIT was the defendant in a diversity-based suit and was, in fact, the party alleging the lack of jurisdiction. Recognizing "the significant difference between the business trust and the conventional trust-differences both in purpose and structure . . ." the court concluded that the REIT could not be treated as a conventional trust and must therefore be treated as an unincorporated association. 446 F.Supp. at 128.

In *Fidelco*, the plaintiffs emphasized the degree of control exercised by the trustees over the business and assets of the REIT. The Court observed:

[7] See also Baer v. United Services Automobile Association, 503 F.2d 393 (2nd Cir. 1974); Fox v. Prudent Resources Trust, 382 F.Supp. 81 (E.D.Pa. 1974); Lowry v. International Brotherhood of Boilermakers, 259 F.2d 568 (5th Cir. 1958); 13 C. Wright, A. Miller and E. Cooper, Federal Practice and Procedure §3630 at 848 (1975).

"This,[plaintiffs] contend, makes Fidelco a conventional trust, rather than an unincorporated association such as a partnership. I cannot agree. True, under the general rule, the degree of control vested in the trustees largely determines whether an entity will be treated as trust or partnership *when personal liability is sought to be imposed on the shareholders.* See, e.g. *Hecht v. Malley, supra,* 265 U.S. at 147, 44 S.Ct. 462 (discussing Mass. decisions); 16A W. Fletcher, *Cyclopedia of the Law of Private Corporations,* §8230 at 554-55, 8261 (1962 & Supp. 1977). The issue in this case is entirely different. It is whether a business trust sufficiently resembles a conventional trust to be accorded like treatment in the determination of its citizenship for diversity purposes. Thus, as was the case with Fidelco's REIT status, the control vested in the trustees does not, without more, require that Fidelco be treated as a trust. Nor does Fidelco's REIT status, when taken together with the trustee's extensive control over its affairs, require that Fidelco be viewed as a trust. Both characteristics evidence some similarities between Fidelco and the conventional trust, but in my view, this similarity is largely offset by the several dissimilarities referred to earlier." 446 F.Supp. at 129.

That *Larwin* and *Fidelco* deal squarely with the issue presented here cannot be denied. That every other reported decision has followed the rationale of *Larwin* is likewise indisputable. See, e.g. *Riverside Memorial Mausoleum v. UMET Trust,* 581 F.2d 62 (3rd Cir. 1978); *Jim Walter Investors v. Empire-Madison, Inc.,* 401 F.Supp. 425 (N.D.Ga. 1975); *Chase Manhattan Mortgage and Realty Trust v. Pendley,* 405 F.Supp. 593 (N.D.Ga. 1975); *Lincoln Associates, Inc. v. Great American Mortgage Investors,* 415 F.Supp. 351

(N.D.Tex. 1976); *Carey v. U.S. Industries, Inc.,* 414 F.Supp. 794 (N.D.Ill. 1976); *Heck v. A.P. Ross Enterprises, Inc.,* 414 F.Supp. 971 (N.D.Ill. 1976); *Independence Mortgage Trust v. White,* 446 F.Supp. 120 (D.Ore. 1978).

In each of those cases the same arguments advanced here were rejected with the observations that "Pleas for extension of the diversity jurisdiction to hitherto uncovered broad categories of litigants ought to be made to the Congress and not to the Court," *Bouligny, supra* 382 U.S. 145, 150-151, 86 S.Ct. 272, 275; and that "to rule otherwise would render the decisions relied upon above a nullity and allow federal jurisdiction to be created at the will of the litigants." *Chase Manhattan, supra,* 405 F.Supp. 593, 595.

The theory that the Trustees are the real parties in interest as that term is defined in Rule 17(a) F.R.Civ.P. is incorrect. In the *Chase Manhattan* case, supra, the Court rejected this argument for two reasons: First, that each of the prior decisions to the effect that citizenship of the shareholders is controlling implicity presumes that they are the real parties in interest; and second, the substantive State law granting the trustees capacity to sue in their own names does not bestow diversity jurisdiction. Each of the District Court decisions cited above are in accord with this construction.

Under the holding of the panel majority in this case, the beneficial interest holders of a real estate investment trust may create or destroy diversity jurisdiction through the simple device of removal or appointment of a trustee having a residence which, when compared to the opposing party, suits the REIT's purpose. Navarro urges that this goes beyond the intent of Congress and conflicts with the *Bouligny* case, *supra.*

The opinion of the Court of Appeals majority in this case holds that Rule 17(a) is correctly applied in the facts of this case. However, it is respectfully submitted that Rule 17(a) does not comprehend the "business trust" as distinguished from the conventional trust. In holding, in effect, that under Rule 17(a) the declaration of trust governing the association of shareholders in a Massachusetts-type business trust controls, the majority relegates the determination of Federal jurisdiction to such shareholders and presumably, would permit them to create or destroy diversity as from time to time may suit their purposes. In this case, while the Trustees admittedly have a great deal of control over the day-to-day management of the business of FMI, it is still the case that the beneficial interest holders ultimately have the power of removal of the Trustees by simple majority vote.

It will be recalled that in *Independence Mortgage Trust v. White, supra,* the business trust was attempting to *defeat* diversity jurisdiction. It is not difficult to imagine the situation where a business trust such as FMI might, in a case of sufficient importance, remove one or more trustees and substitute others so as to create or destroy diversity jurisdiction as suits the immediate purpose.

In this case, the record is not clear as to whether all trustees of FMI were joined as Plaintiffs since, on the Amended Complaint, some of the names which originally appeared have been dropped. Whether there are trustees of FMI who are citizens of the State of Texas and wether the Trustees are themselves beneficial interest holders in the association does not appear from the record. However, the potential for abuse is apparent. Thus, resort to the trust instrument to determine the real parties in interest is of questionable value because

of the transitory nature of the results and the potential for abuse.

The opinion of the Court of Appeals in the instant case further holds that the case of *Morrissey v. Commissioner of Internal Revenue,* 296 U.S. 344, 56 S.Ct. 289, 80 L.Ed. 263 (1935) is inapposite. In that case, the business trust was held to be an unincorporated association for the purpose of taxation. It is respectfully suggested that the panel majority errs in so holding. The characterization of the REIT for tax purposes, while not necessarily controlling, is instructive for determining its status for other related purposes including Federal Court jurisdiction.

A fair reading of *Larwin* clearly militates against the conclusion that Judge Cox considered the tax treatment of REIT's as determinative. The Court observed: "The problem of whether Larwin should be treated, for diversity purposes, as a trust or as an unincorporated association, *appears analogous* to that before the Supreme Court in *Morrissey* . . ." 392 F.Supp. at 100 (emphasis added); and further stated:

> "The advantageous treatment of such publicly-held trusts under certain provisions of the Internal Revenue Code of the United States does not require the courts to treat any such trusts as a traditional trust." 392 F.Supp. at 101.

In each of the other cited cases, it is clear that the respective courts were applying the *Morrissey* reasoning by analogy only.[8] As Judge Taylor observed in *Lincoln*

[8]Lincoln Associates v. Great American Mortgage Investors, supra, 415 F.Supp. at 354-55; Jim Walter Investors v. Empire-Madison, Inc., supra, 401 F.Supp. at 429. Apparently, in the other cited cases, the taxation aspect of REIT's was of even less weight or not a factor at all in the ultimate decision.

Associates, supra, and reiterated in his opinion in this case.

> "The issue before the Court turns not upon an election by [the REIT] under the tax code which results in its being a 'real estate trust' rather than a 'real estate investment trust,' but rather upon the intrinsic nature and purpose of [the REIT] as a business enterprise." 415 F.Supp. at 354

Indeed, analysis of the Supreme Court's opinion in *Morrissey*, indicates it is not mere semantics to state that this Court was concerned not with the question of the tax treatment of the trust in question, but rather whether such trust, as a business enterprise, was sufficiently distinct from a traditional "trust" as to render it an "association" for any purpose including incidentally, taxation. *Morrissey, supra,* 296 U.S. at 356-60, 56 S.Ct. at 295-96; *Fidelco, supra,* 446 F.Supp. at 127, n.3.

From the foregoing analysis of the relevant cases two important facts are clear: (i) that *Morrissey* dictates that a "business trust" organized for the purpose of conducting an on-going business, dynamic in its interests, ownership and trustee-management, is an unincorporated business association regardless of its characterization as a "trust" and (ii) that *Bouligny* requires that for diversity purposes an unincorporated association—once it is properly so characterized—has as its citizenship the residence of each of its constituent members or interest holders. Applying the Supreme Court decisions to REIT's, each of the District Courts have properly concluded that the large, publicly traded REIT's lack the requirement of complete diversity where there are shareholders residing in the same state as the opposing party.

Faced with the obvious direct precedental effect of the *Bouligny-Morrissey* analysis as applied in *Larwin,* etc. the Trustees in their brief before the Court of Appeals argued that (i) the *Larwin* group of cases are factually distinguishable and (ii) if not distinguishable, the cases are wrong in failing to apply a "traditional analysis" to determine the real parties in interest. The opinion of the majority appears to have rejected the contention that the *Larwin* cases are distinguishable.

The second argument, that "traditional analysis" should be applied in this case, is based upon several cases of less than recent vintage, the precedental value of which is questionable when applied to the facts of this case. Thus, in each of *Susquehanna & Wyoming Valley R.R. & Coal Co. v. Blatchford,* 78 U.S. (11 Wall.) 172, 20 L.Ed. 1979 (1870); *Dodge v. Tulleys,* 144 U.S. 451, 12 S.Ct. 728, 36 L.Ed. 501 (1892); and *Bullard v. City of Cisco,* 290 U.S. 179, 54 S.Ct. 177, 78 L.Ed. 254 (1933), the Supreme Court was concerned with express trusts created for the purpose of securing payment of mortgages on real property or as in *Cisco,* coupon bonds issued by a municipality. In no instance was the trusteeship created for the purpose of operating an on-going business with the attendant features of transferrable shares, continuity of interest, purchase, replacement and sale of assets, sharing of profits, etc. While in each case, the trustees involved were invested with varying degrees of authority, their powers were always tied ultimately to some specific res or indenture transaction. As the Court determined in *Morrissey, supra,* the superficial indicia common to both entities, such as vesting the trustee with legal title to the assets, is not controlling. Rather it is the purpose

for which the trusteeship is created which controls.[9] *Fidelco, supra,* 446 F.Supp. at 127, n.3.

The opinion of the Court of Appeals quotes at some length the provisions of the promissory note from Rockwall Estates, Inc. payable to the individual trustees and the commitment letter allegedly issued by Navarro to Rockwall Estates, Inc. Navarro, of course, is not alleged to be a party to the promissory note transaction and in any event, Navarro believes that the terms of a contractual instrument between a third party and the Trustees could not serve to confer diversity jurisdiction on the Federal Court. More importantly, neither the promissory note nor the commitment letter are material in determining the status of FMI for diversity purposes.

The provisions of the Declaration of Trust referred to in the opinion of the Court of Appeals should not be considered the determinative factor of FMI's status for federal jurisdictional purposes. In the dissenting opinion, Judge Vance cites the opinion of Judge James C. Hill, then a District Judge, in the case of *Chase Manhattan Mortgage & Realty Trust v. Pendley,* 405

[9]The cases of Curb and Gutter Dist. No. 37 v. Parrish, 110 F.2d 902 (8th Cir. 1940); and Allen-West Commission Co. v. Brashear (Cir.Ct. E.D.Ark. 1910), cited by the Trustees involved similar facts. *Parrish* involved the trustee in a municipal bond situation; *Allen-West* involved a real estate deed of trust. The precedental value of Dodge v. Tulleys, supra, and Houston Oil Company v. Village Mills Co., 241 S.W.122 (Tex.Comm.App. 1922, holding approved) are further diminished by the fact that in those cases, the representative parties were also the true parties in interest and all being before the Court, the question of lack of jurisdiction was insignificant. See Des Moines Navigation and R.R. Co. v. Iowa Homestead Company, 123 U.S. 552, 8 S.Ct. 217, 31 L.Ed. 212 (1887).

F.Supp. 593 (N.D.Ga. 1975):

> "Stated simply, since the business trust has the status of an unincorporated association, its citizenship will control the issue of diversity even if the plaintiff were allowed to substitute the individual trustees as the named plaintiffs. The court is of the opinion that to rule otherwise would render the decisions relied upon above a nullity and allow federal jurisdiction to be created at the will of the litigants. To say that diversity jurisdiction exists if the Trustees sue on behalf of the Trust, but does not exist if the Trust sues acting through the Trustees, is to honor form over substance and create problems where none now exist. If the Trustees may sue and create jurisdiction, then may one trustee or two or fewer than all sue and establish jurisdiction? If the Trustees may sue on a promissory note, may they sue on all contracts? For torts? The court is reinforced in its conclusion by the tone and philosophy expressed by the United States Supreme Court in *United Steelworkers of America, AFL-CIO v. R. H. Bouligny Inc.*, 382 U.S. 145, 86 S.Ct. 272, 15 L.Ed.2d 217 (1965) to the effect that if diversity jurisdiction is to be extended to hitherto uncovered broad categories of litigants it ought to be done by the Congress and not the courts."405 F.Supp. at 595.

The majority's approach of determining diversity jurisdiction "on a case by case basis (there being no statutory model) to determine which class [of membership in the organization] has exclusive power to control and manage the trust" will, as pointed out by the dissenting opinion, lead to divergent results and an entire new body of jurisdictional precedents where none is necessary.

The Court's analysis limiting *Bouligny* to labor unions is not a fair reading of that case. The court

there simply held that the citizenship of an unincorporated association is that of each of its members. To restrict the application of *Bouligny* to labor unions is to create a sort of "second-class citizenship" for such an association.

In summary, the opinion of the Court of Appeals in sustaining diversity jurisdiction constitutes the extension of that right to a class of litigants not heretofore contemplated by Congress and an open invitation to use artificial means to create subject matter jurisdiction which otherwise would not exist. The decision in this case overrules not only all prior decisions of the district courts where the issue was squarely presented, but conflicts with the Third Circuit's opinion in *Riverside Memorial Mausoleum, supra,* and the controlling precedents established in *Bouligny* and *Morrissey*, supra. It is respectfully submitted that the opinion of the panel majority is in error and should be reversed.

CONCLUSION

For the reasons stated, it is respectfully submitted that the Supreme Court of the United States should grant the Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit in Cause No. 76-3550 and that upon due consideration the opinion of the Court of Appeals should be reversed and the dismissal of this case for want of jurisdiction by the district court affirmed in all respects.

Respectfully submitted,

BERNUS WM. FISCHMAN
LAWRENCE S. FISCHMAN
Attorneys in Charge for
Petitioner Navaro Savings
Association

Lawrence F. LEE, Jr., et al.

v.

NAVARRO SAVINGS ASSOCIATION.

No. CA 3-74-1231-C.

United States District Court,
N. D. Texas,
Dallas Division.

July 28, 1976.

Trustees of Massachusetts real estate investment trust brought action against savings association to recover for alleged breach of loan commitment agreement. Defendant moved to dismiss for want of subject matter jurisdiction. The District Court, William M. Taylor, Jr., Chief Judge, held that since, among other things, plaintiff was an investment vehicle authorized to issue negotiable shares for public offering, its citizenship, for diversity purposes, was governed by the citizenship of the beneficiaries rather than that of the trustees, that fact that trust was presently under supervi-

sion of bankruptcy court did not warrant a different conclusion since diversity was to be determined as of time action was commenced, i. e., prior to filing of bankruptcy orders, that fact that trust did not presently qualify as a real estate investment trust for federal tax purposes also did not require a different result on question of diversity jurisdiction, that since state law allowed real estate investment trusts to sue and be sued as entities plaintiffs could not bring suit as a class action, that jurisdiction could not be founded on the Bankruptcy Act where defendant did not consent to suit and that federal question jurisdiction was absent since there was no valid claim under the federal securities laws.

Case dismissed.

1. Courts ⇐315

For diversity purposes, a real estate investment trust is governed by the citizenship of each of its beneficiaries, rather than by the citizenship of the trustees. 28 U.S.C.A. § 1332(a).

2. Courts ⇐315

Massachusetts real estate trust, which was an investment vehicle authorized to issue negotiable shares for public offering, was to be treated as an unincorporated association for purposes of diversity jurisdiction; hence, citizenship of beneficiaries, rather than that of the trustees, was determinative. 28 U.S.C.A. § 1332(a).

3. Courts ⇐315

Enactment of legislation permitting real estate investment trusts to escape taxation as associations did not overrule the Morrissey decision, which concluded that business trusts should be taxed as unincorporated associations rather than as ordinary trusts, which principle was used for purpose of determining diversity jurisdiction in suits involving business trusts. 28 U.S.C.A. § 1332(a); 26 U.S.C.A. (I.R.C.1954) §§ 856–858.

4. Courts ⇐315

Diversity is determined as of time the action is commenced; hence, fact that trust

was under supervision of a bankruptcy court which, at least, temporarily suspended all powers of the shareholders over the trustees did not mean that, for diversity purposes, reference was to be had to the citizenship of the trustees, rather than the beneficiaries, since the bankruptcy orders were not entered until after action was commenced. 28 U.S.C.A. § 1332(a).

5. Courts ⇐315

Fact that powers of trustees of Massachusetts business trust were very broad did not require that, for purpose of diversity jurisdiction, citizenship was to be determined by reference to the trustees, rather than to the beneficiaries. 28 U.S.C.A. § 1332(a).

6. Courts ⇐315

Fact that Massachusetts business trust did not presently qualify as a real estate investment trust for federal tax purposes did not require that, for purpose of diversity jurisdiction, citizenship be determined by

reference to the trustees, rather than the beneficiaries since its intrinsic nature and purpose as a business enterprise were such that it could not be treated as either a corporation or an ordinary trust. 28 U.S.C.A. § 1332(a).

7. Federal Civil Procedure ⇐181

Mere fact that every party-plaintiff named as a class representative in suit was a citizen of a state other than that of the defendant did not mean that suit brought by Massachusetts business trust could be maintained as diversity class action suit since state law allowed real estate investment trusts to sue and be sued as entities and, hence, suit could not properly be brought as a class action. Fed.Rules Civ. Proc. rules 17(b), 23.2, 28 U.S.C.A.; Vernon's Ann.Tex.Civ.St. art. 6138a, § 6(A)(2).

8. Federal Civil Procedure ⇐181

Civil rule providing that members of an unincorporated association may bring suit as a class by naming certain members as representative parties must be read in conjunction with rule that the capacity of an unincorporated association to sue is to be

determined by the law of the state in which the district court is held; hence, if state law allows the association to sue as an entity, then a class action is not available. Fed. Rules Civ.Proc. rules 17(b), 23.2, 28 U.S.C.A.

9. Bankruptcy ⇐293(4)

Bankruptcy Act did not confer jurisdiction on federal district court of suit brought by Massachusetts business trust to recover damages resulting from alleged breach of loan commitment agreement, on theory that in any suit brought by the receiver or trustee the defendant could consent to jurisdiction where none would otherwise exist, where defendant never consented to federal jurisdiction; fact that it was not until three months after plaintiffs filed their complaints alleging diversity jurisdiction that defendant moved to dismiss for want of jurisdiction did not constitute implied consent to jurisdiction since motion to dismiss was filed before plaintiffs submitted their first amended complaint, which raised issue of Bankruptcy Act jurisdiction. Bankr.Act, § 23, sub. b, 11 U.S.C.A. § 46(b).

10. Securities Regulation ⇐12

Savings association's loan commitment letter was not a "security" within the meaning of the Securities Exchange Act. Securities Exchange Act of 1934, § 10(b), 15 U.S.C.A. § 78j(b).

See publication Words and Phrases for other judicial constructions and definitions.

11. Securities Regulation ⇐1

Securities Exchange Act was not intended to insure American businesses against bad debts. Securities Exchange Act of 1934, § 10(b), 15 U.S.C.A. § 78j(b).

James A. Ellis, Jr., Carrington, Coleman, Sloman, Johnson & Blumenthal, Dallas, Tex., for plaintiffs.

Bernus Wm. Fischman, Lackshin, Nathan & Berg, Houston, Tex., Lawrence Fischman, Weil, Craig & Fischman, Inc., Dallas, Tex., William P. Weir, Fort Worth, Tex., for defendant.

MEMORANDUM OPINION AND ORDER

WILLIAM M. TAYLOR, Jr., Chief Judge.

This suit was brought by the above named plaintiffs as trustees of Fidelity Mortgage Investors (FMI), a Massachusetts business trust, against defendant Navarro Savings Association for damages resulting from the breach of a loan commitment agreement.

Defendant has moved to dismiss the case for want of subject matter jurisdiction, F.R. C.P. 12(b)(1). Plaintiffs have responded by amending their complaint to allege four separate grounds upon which jurisdiction might properly be based. The Court has reviewed each of those grounds, and finds that none is strong enough to repel defendant's jurisdictional attack.

DIVERSITY OF CITIZENSHIP

Plaintiffs primarily contend, in opposition to defendant's motion to dismiss, that when a real estate investment trust (REIT), such

as FMI, brings suit in federal court, the citizenship of the trustees, not the beneficiaries, is the determinative factor for diversity purposes. Under this view of the law, jurisdiction of this Court would be proper under 28 U.S.C. § 1332(a), since none of the plaintiff trustees are citizens of Texas.

Defendant disputes plaintiffs' contention, citing several recent cases in which other federal district courts have held that for diversity purposes, an REIT is an unincorporated association in which case the citizenship of the beneficiaries is controlling, not the citizenship of the trustees.

Larwin Mortgage Investors v. Riverdrive Mall, Inc., 392 F.Supp. 97 (S.D.Tex.1975) was the first reported case to address this issue. In that case, Judge Cox reviewed the plaintiff's claim that for diversity purposes, an REIT should be treated either as a corporation or as an ordinary trust. If an REIT were a corporation, then citizenship would be determined by looking to the state of incorporation or principal place of business. If a trust, then citizenship of the

trustees would be determinative.[1]

Feeling constrained by the United States Supreme Court's opinions in *Steelworkers v. Bouligny, Inc.*, 382 U.S. 145, 86 S.Ct. 272, 15 L.Ed.2d 217 (1965) and *Morrissey v. Commissioner of Internal Revenue*, 296 U.S. 344, 56 S.Ct. 289, 80 L.Ed. 263 (1935), Judge Cox held that for diversity purposes, a business trust which qualified as an REIT under the Internal Revenue Code must be treated as an unincorporated association, making the citizenship of each of the beneficiaries determinative of jurisdiction.[2]

1. Plaintiffs in the case at bar have not contended that FMI should be treated as corporation for diversity purposes; only that it should be treated as a trust.

2. Judge Cox' reliance on *Bouligny* and *Morrissey* was well-placed. The issue before the Court in *Bouligny* was whether a labor union, for diversity purposes, is a citizen of the state of its principal place of business, or a citizen of the state of each of its members. The Court opted for the latter view, suggesting that any expansion of diversity jurisdiction was a matter for the Congress, not the Courts.

Although *Larwin* was the first case to explore the issue of REIT citizenship for diversity purposes, it has not been the last. Other federal district courts have considered the question, and each one has concurred in the *Larwin* result. *See Saul v. Farnale, Inc.*, Civil Action No. 74-H-128 (S.D.Tex., July 8, 1975), and *Risk v. Jones*, Civil Action No. 75-97A (N.D.Ga., June 19, 1975).

[1] Against the above authority, plaintiff trustees of FMI have asserted their belief that *Larwin* was incorrectly decided, and have offered several arguments in support of that belief. At the time those arguments were urged by plaintiffs, the issue of REIT citizenship was one of first impression in this Court. That is no longer the case. This Court has subsequently rendered a decision in *Lincoln Associates, Inc. v. Great American Mortgage Investors*, 415 F.Supp. 351 (N.D.Tex.1976), in which it held that the citizenship of an REIT for diversity purposes is governed by the citizenship of each of its beneficiaries. That holding

must also apply to the case at bar.

[2] The jurisdictional facts in the two cases are virtually identical. Like the defendant REIT in *Lincoln*, FMI is a Massachusetts real estate trust,[3] organized under a Declaration of Trust. FMI is an investment vehicle authorized to issue negotiable shares for public offering.[4] The powers of FMI's trustees are nearly the same as those of the trustees in *Lincoln*, and the powers of the shareholders are equally similar. Given these similarities in fact, similarity in law must logically result.

> The Court in *Morrissey* was faced with a determination of the treatment of a business trust for tax purposes. It ultimately concluded that business trusts should be taxed as unincorporated associations rather than as ordinary trusts, reasoning that the object of a business trust is "not to hold and conserve particular property, . . . but to provide a medium for the conduct of a business and sharing its gains."
> 296 U.S. at 357, 56 S.Ct. at 295.

3. Declaration of Trust, Section 1.3

4. Declaration of Trust, Section 6.1

Most of the arguments asserted by FMI in support of its diversity claim were addressed by this Court in *Lincoln*. First, plaintiffs argue that the *Larwin* court's reliance on *Morrissey* was misplaced because *Morrissey* was a tax case, and the characterization of an entity for tax purposes should not control its characterization for diversity purposes. That argument was dispelled in *Lincoln*:

> The *Morrissey* analysis of types of entities and enterprises is clearly applicable to the case at bar, and dictates [the REIT's] treatment as an unincorporated association. Nothing in that opinion indicates that the Supreme Court would treat a business trust any differently for purposes of determining diversity jurisdiction.

Supra, at page 354.

[3] Second, plaintiff contends that Congress overruled much of *Morrissey* when it enacted legislation to permit REIT's to escape taxation as associations, under §§ 856–58 of the Internal Revenue Code of 1954.

Such an interpretation, however, reads too much into the statute. Congress did not alter *Morrissey's* definition of "business trusts," it merely granted more favorable tax treatment to REIT's. And absent more explicit legislation, this Court will adhere to the *Morrissey* definition. For, as the Supreme Court concluded in *Bouligny*, "pleas for extension of the diversity jurisdiction to hitherto uncovered broad categories of litigants ought to be made to the Congress and not to the Courts." *Supra*, 382 U.S. at 150–51, 86 S.Ct. at 275.

[4, 5] Plaintiffs additionally maintain that as trustees of FMI, their powers over the trust are so broad that the citizenship of each of them should control for the purpose of determining diversity jurisdiction. They attempt to buttress this argument with the fact that FMI is now under the supervision of a Bankruptcy Court,[5] which at least temporarily suspends all powers of its shareholders over its trustees.

5. See affidavit of Arthur Milam, which contains the bankruptcy court orders.

This latter argument is not valid. Diversity is determined as of the time the action is commenced, *Louisville, N. A. & C. R. Co. v. Louisville Trust Co.*, 174 U.S. 552, 19 S.Ct. 817, 43 L.Ed. 1081 (1899), and the bankruptcy orders upon which plaintiffs rely were not entered until after the case at bar was commenced on December 13, 1974.

As to plaintiffs' main argument that the trustees' powers are so broad as to make their citizenship determinative of jurisdiction, this Court need only commend plaintiffs to *Lincoln* which dealt with trustees' powers of similar scope:

> When one considers the . . . characteristics of [the REIT] in light of the Supreme Court's analysis [in *Morrissey*], it becomes manifestly clear that [the REIT] is not an ordinary trust. It is a business trust or association, and, in view of the mandate to narrowly construe and define diversity jurisdiction, this Court cannot treat it as an ordinary trust for diversity purposes. Rather, it must be treated as an unincorporated association (footnote omitted).

Supra, at page 354.

[6] Plaintiffs finally suggest that *Larwin* is inapplicable to their case, because FMI is not now qualified as an REIT for tax purposes. The Court responded to this same suggestion in *Lincoln*:

> This argument is without merit. The issue before the Court turns not upon an election by [defendant] under the tax code which results in its being a "real estate trust" rather than a "real estate investment trust," but rather upon the intrinsic nature and purpose of [defendant] as a business enterprise.

Supra, at page 354. Although FMI is not officially recognized as an REIT for tax purposes, its "intrinsic nature and purpose" as a business enterprise are such that it cannot be treated as either a corporation or an ordinary trust. Hence the citizenship of its shareholders must be the determinative factor for diversity purposes.

CLASS ACTION

[7, 8] Plaintiffs have alternatively alleged that suit has been properly brought in this Court as a class action under FRCP 23.2. That rule provides that members of an unincorporated association may bring suit as a class by naming certain members as representative parties, provided that those parties "will fairly and adequately protect the interests of the association and its members."

Not coincidentally, every party-plaintiff named as a class representative in the case at bar is a citizen of a state other than Texas. Therefore, plaintiffs contend, the diversity of citizenship requirement has been met.

The Court is not so inclined. Rule 23.2 must be read in conjunction with Rule 17(b), which orders that the capacity of an unincorporated association to sue be determined by the law of the state in which the district court is held. If state law allows the association to sue as an entity, then a class action under Rule 23.2 is not available.

Suchem, Inc. v. Central Aguirre Sugar Co., 52 F.R.D. 348 (D.P.R.1971).

Since Texas law allows REIT's to sue and be sued as entities, Tex.Rev.Civ.Stat.Ann. art. 6138A § 6(A)(2) (1961), plaintiffs cannot properly bring this suit as a class action.

BANKRUPTCY JURISDICTION

[9] Absent diversity or class action jurisdiction, plaintiffs further contend that § 23(b) of the Bankruptcy Act[6] confers jurisdiction on the Court because 1) a debtor-in-possession occupies the same position as a receiver or trustee, and 2) under the Bankruptcy Act, a defendant, in a suit brought by a receiver or trustee, can consent to jurisdiction where none otherwise would exist.

6. Section 23(b) reads as follows: "Suits by the receiver and the trustee shall be brought or prosecuted only in the courts where the bankrupt might have brought or prosecuted them if proceedings under this Act had not been instituted, unless by consent of the defendant, except as provided in sections 60, 67, and 70 of this Act." 11 U.S.C. § 46(b) (1964).

The Court does not reach the question of whether plaintiff trustees, as debtors-in-possession, occupy the same position as receivers in bankruptcy, because it is clear from the facts that defendant has never consented to jurisdiction in this cause.

A brief review of pertinent facts is in order. Plaintiffs filed their complaint on December 13, 1974, alleging jurisdiction based on diversity of citizenship. On January 10, 1975, defendant answered, and requested a stay of the proceedings. On January 30, 1975, plaintiffs were adjudged debtors-in-possession of FMI. Defendant did not file its motion to dismiss for want of jurisdiction until March 16, 1976, and plaintiffs now claim the delay served to imply consent to jurisdiction.

The Court is not persuaded. The cases cited by plaintiffs that deal with consent involved suits brought by persons in their capacities as receivers or trustees in bankruptcy. The case at bar does not fall into that category.

Plaintiffs should be reminded that de-

fendant's motion to dismiss was filed *before* plaintiffs submitted their first amended complaint, which effectively superseded their original complaint. 3 J. Moore, Federal Practice ¶ 15.08[7] (2d ed. 1975). They should also take note of the well established principle that "[i]t is never too late for a party, or the court on its own motion, to assert lack of jurisdiction over the subject matter." C. Wright, Federal Courts § 69, at 292 (2d ed. 1972).

FEDERAL QUESTION JURISDICTION

[10, 11] Plaintiffs' hodge-podge of jurisdictional allegations ends with a claim that their injuries were the result of defendant's violation of Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b) (1970), and its implementing Rule 10b–5, 17 C.F.R. § 240.10b–5 (1975). Plaintiffs have alleged no facts in support of this claim, and perhaps rightly so, since it has absolutely no merit.

Suffice it to say that 1) defendant's commitment letter is not a "security," *see Unit-*

***ed Housing Foundation, Inc. v. Forman*, 421 U.S. 837, 95 S.Ct. 2051, 44 L.Ed.2d 621 (1975), *cf. United States v. Austin*, 462 F.2d 724 (10th Cir. 1972), and 2) the Securities Exchange Act of 1934 was never intended to insure American businesses against bad debts. As the Fifth Circuit noted in *Bellah v. First National Bank of Hereford*:**

> We doubt that Congress intended by [this Act] to render federal judges the guardians of all beguiled makers or payees.

495 F.2d 1109 at 1113–14 (5th Cir. 1974).

Having reviewed each of the jurisdictional allegations offered by plaintiffs, the Court is of the opinion that it lacks jurisdiction over the subject matter of this lawsuit. Accordingly, the case must be dismissed.

Michael McHALE, Plaintiff,

v.

David MATHEWS, Secretary of Health, Education and Welfare, Defendant.

No. 75 Civ. 5636–LFM.

United States District Court,
S. D. New York.

July 30, 1976.

Claimant sought review of denial of disability benefits by the Secretary of Health, Education and Welfare. The District Court, MacMahon, J., held that testimony by vocational expert that there were a number of office and factory jobs in the area which the claimant could perform sustained denial of benefits.

Dismissed.

1. Social Security and Public Welfare ⇐149

Judicial review of denial of disability benefits by the Secretary of Health, Education and Welfare is limited to a determination of whether the Secretary's administrative decision is supported by substantial evidence. Social Security Act, § 205(g), 42 U.S.C.A. § 405(g).

2. Social Security and Public Welfare ⇐149

Decision of administrative law judge to deny disability benefits became the final decision of the Secretary of Health, Education and Welfare when it was approved by the appeals council.

3. Social Security and Public Welfare ⇐143.5(2)

Eligibility for disability insurance benefits under social security requires a showing by a claimant that he is unable to engage in substantial gainful activity by reason of a physical or mental impairment which can be expected to result in death or to last for a continuous period of at least 12 months. Social Security Act, § 223(d), 42 U.S.C.A. § 423(d).

4. Social Security and Public Welfare
⇐148

Determinations by the Secretary of Health, Education and Welfare as to the facts concerning claimant's disability are conclusive if supported by substantial evidence; rule applies not only as to findings of basic evidentiary facts but also as to the inferences and conclusions to be drawn from them. Social Security Act, § 205(g), 42 U.S.C.A. § 405(g).

5. Social Security and Public Welfare
⇐148

Court cannot set aside Secretary of Health, Education and Welfare's denial of disability benefits if the record contains evidence which a reasonable mind would accept as adequate to support that determination. Social Security Act, § 205(g), 42 U.S.C.A. § 405(g).

6. Social Security and Public Welfare
⇐143.5(10)

Testimony by vocational expert that 37-year-old carpenter who had suffered leg injury could, in view of his prior work as a

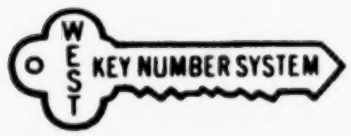
tion of the issues. The trial court can treat the pretrial order as amended by the consent of the parties. *See Mains v. United States*, 508 F.2d 1251, 1259 (6th Cir. 1975); *Bucky v. Sebo*, 208 F.2d 304, 305 (2d Cir. 1953). In such a case, the court properly can enter a judgment that decides issues outside the scope of the original pretrial order.

[4] The parties in this case disagree on whether they actually tried the entire patent. The district court's opinion notes that the other claims in the patent "are dependent upon claim 1 for their validity," but the record does not show whether the parties could present additional evidence with respect to the patent claims not identified in the pretrial order. We therefore vacate the part of the judgment that invalidates patent claims other than claims 1, 2, 3, and 7, and remand for the district court to determine whether the parties actually litigated or wish to litigate the remaining claims in the patent. After giving the parties an opportunity to adduce new evidence and

arguments on the remaining patent claims, the district court may amend the pretrial order and enter an appropriate judgment.

Accordingly, the judgment is affirmed insofar as it invalidates claims 1, 2, 3, and 7 of Patent No. 3,797,680 and declares that Perfection-Cobey has not infringed those claims. The judgment is vacated insofar as it invalidates other claims in the patent, and the case is remanded for further proceedings consistent with this opinion.

Affirmed in part; Vacated in part; and Remanded.



Lawrence F. LEE, Jr., et al.,
Plaintiffs-Appellants,

v.

NAVARRO SAVINGS ASSOCIATION,
Defendant-Appellee.

No. 76–3550.

United States Court of Appeals,
Fifth Circuit.

June 18, 1979.

A suit for breach of contract was dismissed by the United States District Court for the Northern District of Texas, at Dallas, William M. Taylor, J., 416 F.Supp. 1186, for lack of jurisdiction. On appeal by the plaintiffs, the Court of Appeals, Ainsworth, Circuit Judge, held that in view of specific provisions of a declaration of trust, and in view of fact that a promissory note was specifically made payable to order of trustees, it was citizenship of plaintiff trustees, the real parties in interest, and not that of beneficiary shareholders to which the Court would look to discern diversity of citizen-

ship in an action brought by the trustees against a savings association for breach of commitment to lend money for payment of the note.

Reversed and remanded for trial on the merits.

Vance, Circuit Judge, dissented and filed opinion.

Federal Courts ⇐290

In view of specific provisions of declaration of trust, and in view of fact that promissory note was specifically made payable to order of trustees, it was citizenship of plaintiff trustees, the real parties in interest, and not that of beneficiary shareholders to which Court would look to discern diversity of citizenship in action brought by trustees against savings association for breach of commitment to lend money for payment of note. 28 U.S.C.A. §§ 1331, 1332; Fed.Rules Civ.Proc. rules 17(a), 23.2, 28 U.S.C.A.; Securities Exchange Act of 1934, § 1 et seq., 15 U.S.C.A.

§ 78a et seq.

James A. Ellis, Jr., Don R. Hanmer, Dallas, Tex., for plaintiffs-appellants.

Ernest E. Figari, Jr. (Institutional Investors Trust), David P. Seikel, Dallas, Tex., amicus curiae.

Bernus W. Fischman, Houston, Tex., Lawrence Fischman, Dallas, Tex., for defendant-appellee.

Appeal from the United States District Court for the Northern District of Texas.

Before BROWN, Chief Judge, and AINSWORTH and VANCE, Circuit Judges.

AINSWORTH, Circuit Judge:

The question for decision is whether the district court correctly dismissed this suit for lack of jurisdiction.

Plaintiffs are eight individuals, all non-Texas citizens and trustees of Fidelity Mortgage Investors, a Massachusetts business trust (FMI), who filed this complaint

as representatives of FMI seeking damages for breach of contract against defendant Navarro Savings Association, a Texas corporation, in the sum of $1,174,525.17 plus interest and attorneys' fees.

Jurisdiction is asserted by plaintiffs under both the diversity of citizenship and federal question provisions of law. 28 U.S.C. §§ 1332, 1331. The district court rejected both bases of citizenship.[1] We disagree with the district court's ruling and hold that jurisdiction should have been maintained under diversity of jurisdiction. It is thus unnecessary that we consider

1. The district court in a written opinion held that the citizenship of each of the numerous shareholders of the trust rather than the eight trustee plaintiffs was determinative of jurisdiction and diversity of citizenship was therefore lacking. Other contentions of plaintiffs relative to the right to maintain a class action under Federal Rules of Civil Procedure, Rule 23.2 (pertaining to actions by representative parties on behalf of members of an unincorporated association), and to federal question jurisdiction under the Securities Exchange Act of 1934, were also denied.

whether there is also federal question jurisdiction.

According to the allegations contained in plaintiffs' complaint, on September 9, 1971, the president of Rockwall Estates, Inc. executed on behalf of the corporation a promissory note to plaintiffs in the amount of $850,000 to evidence money lent to the corporation. The note provided that the principal amount should become due and payable two years from the date thereof but interest payments were to be due and payable monthly. The promissory note provided in pertinent part as follows:

> FOR VALUE RECEIVED, the undersigned Rockwall Estates, Inc., (hereinafter sometimes referred to as "Maker"), hereby promises to pay to the order of Laurence F. Lee, Jr., Bert A. Betts, Roy B. Davis, Jr., N. Clement Slade, Jr., Robert M. Green, Luther H. Hodges, James B. McIntosh, Arthur W. Milam, Jack H. Quaritius, Frederick H. Schroeder and John W. York, not individually, but as Trustees of Fidelity Mortgage Investors,

a Massachusetts Business Trust, under Declaration of Trust dated May 29, 1969 (hereinafter referred to as "FMI") and their respective successor Trustees under said Declaration of Trust, with power to protect, manage, sell, deliver, transfer, endorse with or without recourse, modify, extend, consolidate, coordinate and spread with any other note, negotiate, collect, discharge, accelerate, enforce and/or without being limited by any of the foregoing deal in any manner with this note, the obligations represented thereby, and exercise any right or option contained in this note, the principal sum of Eight Hundred Fifty Thousand and 00/100 ($850,000.00) Dollars, or so much thereof that may be advanced, together with interest thereon from the date of advances on outstanding principal balance at the rate of five percent (5%) above the prime rate of interest charged by Morgan Guaranty Trust Company of New York, or its successors, on the business day preceding the first day of each successive month during the term hereof,

but shall in no case be in excess of one and one/half percent (1½%) per month.

According to the allegations of plaintiffs' suit, prior to and contemporaneously with the execution of the promissory note described, defendant Navarro Savings Association of Dallas, Texas, acting through its president, executed loan commitment letters to Rockwall Estates, Inc. dated July 26, 1971, which were delivered and accepted by Rockwall's president at the closing of the loan by FMI to Rockwall Estates, Inc. on September 9, 1971. Under these "take out" commitment letters defendant Navarro agreed to loan to Rockwall Estates, Inc. $850,000 any time between September 8, 1973 and August 31, 1974 "so that such sum could be used by Rockwall Estates, Inc. to pay to Plaintiff the sums due under the note to them."[2]

2. The pertinent Navarro Savings Association commitment letter to Rockwall Estates, Inc. dated July 26, 1971, which was accepted by Rockwall Estates, Inc. on September 9, 1971, reads in part as follows:

1. *Commitment.* Subject to and upon the

(continued)

footnote continued

terms and conditions contained herein, and in consideration for the payment to Navarro Savings Association ("Association"), of the sum of Eight Thousand Five Hundred Dollars ($8,500.00) as a commitment fee, Association hereby agrees to loan to Rockwall Estates, Inc., a Texas corporation, ("Borrower"), at any time during the period from and after September 8, 1973, and until and including August 31, 1974, the principal sum of Eight Hundred Fifty Thousand Dollars ($850,000.00) (the "Loan").

2. *Note and Deed of Trust.* The indebtedness arising pursuant to the Loan shall be evidenced by a promissory note (the "Note"), executed by Borrower, dated the day the Loan is made (the "Funding Date"), in principal amount of the Loan, bearing interest at a rate equal to the lesser of (a) a rate per annum of five per cent (5%) over the prime rate being charged by the Chase Manhattan Bank (National Association) on the Funding Date or (b) one and one-half per cent (1½%) per month, on the unpaid principal balance from time to time remaining, with accrued interest payable quarterly and with principal and all accrued interest being finally due and payable two (2) years after the Funding Date. The Note shall be secured by a deed of trust (the "Deed of Trust") covering the real property, described on Exhibit "A" attached hereto and all improvements, fixtures and personal property situated thereon (the "Mortgaged

(continued)

footnote continued

Property"), granting to Association a valid, legal and enforceable first and prior lien and security interest on the Mortgaged Property, subject to no liens, restrictions, encumbrances, easements or other exceptions to title except those approved in writing hereafter by Association. The Note and Deed of Trust shall be substantially in the form of Exhibits "B" and "C" attached hereto and incorporated herein by reference (with appropriate blanks therein completed correctly).

. . . . .

8. *Pledge of Commitment.* This Commitment and the proceeds therefrom may be pledged by Borrower or a security interest may be granted by Borrower therein, but in no event shall Association be required to perform this commitment except in accordance with its terms.

9. In the event this Commitment is pledged as security for a loan to Borrower from Fidelity Mortgage Investors under the terms of the commitment letter from Fidelity Mortgage Investors dated August 6, 1971, the holder of such loan, upon thirty (30) days written notice, may require Association to make the loan committed hereby prior to September 8, 1973; provided, however, at the time of such notice and at the time of closing of the loan, Borrower must have been delinquent for more than sixty (60) days in

(continued)

Plaintiffs also alleged that on August 5, 1971, the president of defendant Navarro sent to FMI through Ronald L. Langley for its advisors a letter agreement (attached as an exhibit) which provided that Navarro would either purchase the Rockwall mortgage note of $850,000 or make available funds for additional loan at any time the note becomes delinquent. It was further alleged that on September 9, 1971, at the closing of the loan by FMI to Rockwall, the president of defendant Navarro executed and delivered the loan commitment letters and orally stated to FMI's representative that the commitment fee had been actually received by Navarro. Thereafter, on September 10, 1971, the president of Rockwall assigned in writing the commitment letters and obligations of defendant Navarro to FMI. It is alleged that it was upon reliance of the assignment and commitment letters

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footnote continued

the payment of installments due on the loan from Fidelity Mortgage Investors and Borrower must have complied with all the terms and provisions of this Commitment.

that the loan of $850,000 was made by FMI to Rockwall.

Plaintiffs further alleged that when Rockwall Estates, Inc. became sixty days' delinquent in the payment of installments due on its loan to FMI, FMI gave defendant Navarro notice to make the loan covered by its commitment, but Navarro "breached its obligation under the commitment to make the loan in question" causing FMI to foreclose on the Deed of Trust on real estate securing the note, and resulting in damages and a deficiency to plaintiffs in the amount of $174,525.17 plus interest and attorneys' fees as provided in the note plus $1,000,000 punitive and exemplary damages.

The allegations in the suit of plaintiffs, trustees of FMI, disclose that under Article III of the Declaration of Trust, "Trustees' Power," the trustees have the following general power (3.1):

> The Trustees shall have, without other or further authorization, *full, absolute and exclusive power, control and authority over the Trust Estate* and of the busi-

ness and affairs of the Trust, *free from any power and control of the Shareholders*, to the same extent as if the Trustees were the sole owners of the Trust Estate in their own right, subject only to the limitations contained in this Declaration. The Trustees may do and perform such acts and things as in their sole judgment and discretion are necessary and proper for carrying out the purposes of the Trust or conducting its business and affairs. The enumeration of specific powers shall not be construed as limiting the exercise of general powers or any other specific power. Such powers of the Trustees may be exercised without order of or resort to any court.

(emphasis supplied)

Article III, "Specific Powers," (3.2r) of the Declaration provides that the powers of the trustees shall include the power "[t]o collect, sue for and receive all sums of money coming due to the Trust, and to prosecute, join, defend, compromise, abandon, or adjust, any actions, suits, claims, demands

or other litigation relating to the Trust, the Trust Estate or the Trust's affairs."

Article I of the Declaration of Trust (1.1) states in part that "the Trustees shall conduct and transact the activities of the Trust, make and execute all documents and instruments and sue and be sued in the name of the Trust or in their names as Trustees of the Trust."

A careful review of the Declaration of Trust, as indicated above, amply supports plaintiffs' contention that as trustees of FMI they are the real parties at interest, exclusively entitled to enforce the rights at issue in this case. In addition to the powers already enumerated, plaintiffs as trustees have absolute power to invest the capital and funds of the trust, to lend money, and to possess and exercise the rights incident to the ownership of mortgage loans. *See* Declaration of Trust, Article 3.2(a), (b), (c), (g) and (k). Article IV states that the trustees are "responsible for the general policies of the Trust and for such general supervision of the business of the Trust

conducted by officers, agents, employees, investment advisers or independent contractors of the Trust as may be necessary to insure that such business conforms to the provisions of this Declaration."

On the other hand, the shareholders' rights are extremely limited, since they are entitled only to the rights of equitable interest owners or beneficiary shareholders, without any powers of control or management whatsoever. For example, Article 6.2, "Rights of Shareholders," in the Declaration reads in pertinent part as follows:

> The Shareholders shall have no legal right, title or interest in or to the Trust Estate and shall have no right to a partition thereof during the continuance of the Trust. Shareholders shall, however, be the equitable beneficiaries of the Trust, but shall have only the rights provided for in this Declaration and in the Trustees' Regulations. Except with respect to matters in which the Shareholders are specifically given the right to vote by this Declaration, no action taken by

> the Shareholders at any meeting shall in any way bind the Trustees.

Thus, according to the allegations of the suit and accompanying exhibits, it is apparent that the general and specific powers relating to the management and control of the FMI trust repose in the eight trustees who are plaintiffs in this suit. The Declaration of Trust could not be more specific in this regard. Likewise, the Rockwall promissory note of $850,000 was specifically made payable to the order of the eight trustees, plaintiffs herein, in their capacities as trustees of FMI under the Declaration of Trust.

The effect of the district court's holding that the citizenship of each of the shareholders must be considered rather than the citizenship of the individual trustees, in practical effect, denies access to the federal courts of a business trust under diversity of citizenship jurisdiction since it is virtually impossible to establish the citizenship of each of the approximately 9,500 beneficiary shareholders.

Since the eight plaintiff trustees who are

charged with the power to sue and be sued on behalf of the trust, and who are the persons in actual control of the trust and the real parties in interest, are citizens of a state other than Texas, and Navarro Savings is a citizen of Texas, there is complete diversity between plaintiffs and defendant. We look, therefore, to the citizenship of the plaintiff trustees, not to that of the beneficiary shareholders, to discern diversity of citizenship in this case for purposes of jurisdiction.

The Declaration of Trust clearly and unequivocally states that the real parties in interest in matters affecting the FMI trust are the named trustees. Their right to prosecute the action is also provided by the Federal Rules of Civil Procedure, Rule 17(a), which reads in pertinent part as follows:

> *Every action shall be prosecuted in the name of the real party in interest.* An executor, administrator, guardian, bailee,

3. *Contra, Carlsberg Resources Corp. v. Cambria Savings & Loan Association*, 3 Cir., 1977,

> *trustee of an express trust*, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in his own name without joining with him the party for whose benefit the action is brought; and when a statute of the United States so provides, an action for the use or benefit of another shall be brought in the name of the United States.

(emphasis supplied)

Thus, under the Federal Rules of Civil Procedure the trustee of an express trust may sue in a representative capacity on behalf of the trust. FMI is not a party to these proceedings. The trustees of the trust are the plaintiffs, all of whom are of non-Texas citizenship. It is unnecessary, therefore, to look beyond the terms of the Declaration of Trust, the provisions of the promissory note, and the Federal Rules of Civil Procedure to determine that the true parties in interest in this case, in exclusive control of the trust, with the sole right to bring this action, are the eight trustee

plaintiffs.

The trust here is analogous to a limited partnership, and the citizenship of its beneficiary shareholders should not be counted in determining the existence of diversity jurisdiction. The citizenship of the shareholders should be disregarded in the same manner as was done by the Second Circuit in *Colonial Realty Corp. v. Bache & Co.*, 1966, 358 F.2d 178, 184 (Friendly, J.), *cert. denied*, 385 U.S. 817, 87 S.Ct. 40, 17 L.Ed.2d 56 (1966), where the Court held that "a suit brought against a New York partnership must thus be considered to be against the general partners only and identity of citizenship between a limited partner and the plaintiff does not destroy diversity." [3]

The Comment, *Limited Partnerships and Federal Diversity Jurisdiction*, 45 U.Chi.L. Rev. 384, 407, states the real party in interest principle very succinctly:

> Thus, the principle unifying the apparently conflicting jurisdictional precedents

554 F.2d 1254; *Riverside Memorial Mausoleum, Inc. v. UMET*, 3 Cir., 1978, 581 F.2d 62.

> is not the "persons composing" rule *but the "control" or "real party" concept.* The members of joint stock companies, limited partnership associations, and general partnerships "count" for diversity purposes because all the members exercise management powers. This control is manifested in several ways: in the management role of the respective members, their rights with respect to entity property, their ability to effect dissolution of the entity, their liability for the entity's debts and obligations, and in their capacity to sue and be sued on behalf of the entity. Corporate shareholders and *trust beneficiaries, in contrast, have only "equitable" interests in their respective entities.* Because limited partners do not enjoy the requisite control over the partnership, they have only an "equitable" interest in proceedings brought by or against the partnership, and thus, like corporate shareholders and *trust beneficiaries, should not be counted for diversity purposes.* The result in *Colonial Realty*, far from expanding the diversity jurisdiction,

is but an application of a principle underlying the Supreme Court's diversity jurisdiction decisions over the past 125 years.

(emphasis supplied) (footnotes omitted) The same Comment discusses the holdings in the *Colonial Realty* and opposing *Carlsberg Resources* cases in the following reasoned manner:

> The Second Circuit, in *Colonial Realty Corp. v. Bache & Co.*, departed from the tradition of dogmatic application of the *Chapman-Great Southern* rule and held that in suits involving limited partnerships the citizenship of only the general partners is relevant for diversity purposes. The court relied on the statutory distribution of *rights, powers, and responsibilities* between the general and the limited partners in concluding that the latter should be disregarded in determining diversity. Although the decision has been followed by courts in the Second and Fourth Circuits, the Third Circuit, in *Carlsberg Resources Corp. v. Cambria Savings & Loan Association,* reached a contrary result, finding that *Colonial Realty* was not a proper interpretation of the "persons composing" test, but an unwarranted expansion of the scope of diversity jurisdiction. The majority in *Carlsberg Resources* read the body of Supreme Court precedent as conclusively foreclosing an approach that would distinguish between classes of association members.

Although the court in *Colonial Realty* did not fully develop the reasoning behind its decision, the result in that case stands on solid ground. Examination of *Chapman* and *Great Southern* reveals that those cases did not reject a distinction for jurisdictional purposes between classes of association members. On the contrary, the rationale for such a distinction can be culled from a comparison of the seemingly irreconcilable *Marshall* and *Chapman* decisions. In *Marshall* the Court observed that shareholders were not real parties to litigation involving a corporation and hence were irrelevant to the jurisdictional test. In *Chapman,* on the other hand, the joint stock company's

shareholders were clearly the parties controlling the company, and their personal assets stood behind the company's debts. The characteristics that compelled reference to all the association members in *Chapman* are not found in the case of limited partners, who are analogous to corporate shareholders. *A jurisdictional test that looks to the real parties to the controversy not only makes sense of the diversity precedents, but also accords well with the protective policy underlying the diversity jurisdiction, a policy which remains vital today.*

Id. at 417–18 (emphasis supplied).[4]

It is pertinent to note that the two Supreme Court cases principally relied upon by the district court as authority for dismissing this suit for lack of jurisdiction are inappropriate and inapposite. *United Steelworkers v. R. H. Bouligny, Inc.*, 382 U.S. 145, 86 S.Ct. 272, 15 L.Ed.2d 217 (1965), cited by the district court as authority for its holding that the citizenship of each of the beneficiary shareholders is decisive for purposes of diversity jurisdiction, does not pertain to the circumstances here. In *Bouligny* the question was whether an unincorporated labor union should be treated as a citizen for purposes of federal jurisdiction without regard to the citizenship of its members, and the Court answered in the negative. However, we do not read in *Bouligny* a general rule that the courts must look to all unincorporated associations' membership to determine diversity jurisdiction. The present case differs on its facts from *Bouligny* since, under the express provisions of the Declaration of Trust here, the trustees are designated as the ones in exclusive control of the trust, with power to sue and be sued on behalf of the trust, and no such authority is conferred on the beneficiary shareholders. Additionally, the Rockwall promissory note here was made payable to the trustees who brought this suit.

Bouligny is applicable only to business

4. Citations of cases referred to in the text, not otherwise shown, are as follows: *Chapman v. Barney*, 129 U.S. 677, 9 S.Ct. 426, 32 L.Ed. 800 (1889); *Great Southern Fireproof Hotel Co. v. Jones*, 177 U.S. 449, 20 S.Ct. 690, 44 L.Ed. 842 (1900); *Marshall v. Baltimore & Ohio R.R.*, 57 U.S. (16 How.) 314, 14 L.Ed. 953 (1853).

associations which seek federal court diversity jurisdiction as entities. Here, the trustees sue as individual representatives of the trust, and assert federal jurisdiction as such. No attempt is made by the individual parties to become entities as occurred in *Bouligny*. We note that the opinion in *Bouligny* does not inform us who to look to as the relevant members of the association whose citizenship determines diversity jurisdiction. In *Bouligny* the Court was concerned with an unincorporated association having only one class of membership. In the instant case, our real-party-in-interest analysis notes that there is no single class of membership, all with equal rights to control and management such as in a general partnership. In the present case, another class, the trustees, has the exclusive control and management of the trust and the sole right to sue and be sued. To decide which class of membership or shareholders should be counted for diversity jurisdiction purposes, it is necessary on a case-by-case basis (there being no statutory model) to determine which class has exclusive power to

control and manage the trust. Here, the trustees and their citizenship alone should be looked to for the purposes of determining if each of them is diverse from that of the defendant.[5] "[A] close reading of *Bouligny* suggests that the Court's language concerning the limitations of the judicial role can be restricted to the facts of the case. The Court's discussion of the difficulties of fashioning a test for labor union citizenship can be read as explaining why only Congress could extend citizenship to unions as entities." (footnote omitted) 45 U.Chi.L.Rev. 384, 392.[6]

5. *See* 13 Am.Jur.2d, Business Trusts § 98 (1964), which reads as follows:

> Jurisdiction of an action instituted in a federal court in the name of the trustees of a business trust will be governed by the residence of the trustees rather than the shareholders, even though the latter may have the beneficial interest and ultimate power of control of the business.

6. As the Comment in the Chicago Law Review states more explicitly:

> *Bouligny* should not be regarded as dispositive of all business trust cases. The determi-

Nor is the citation by the district court of *Morrissey v. Commissioner of Internal Rev-*

footnote continued

nation of proper parties for diversity purposes should not turn on whether the entity is of a "business" character, but on the allocation of rights and liabilities between the beneficiaries and the trustees. Analysis of the cases from the perspective of the "real party" principle suggests that some of the recent *REIT* cases may have been decided incorrectly. If a beneficiary of a business trust is truly a passive investor who has no significant voice in the management of the trust, like the limited partner he should not be deemed a party to the action.[179] Trust agreement terms that permit the beneficiaries to remove the trustees or to prevent transfers of trust property do not seem to vest the management of the trust in the beneficiaries; such provisions only give beneficiaries certain powers that corporate shareholders commonly wield.[180]

[179] Under the theoretical model of the business trust the role of the beneficiaries is clearly distinguishable from that of the shareholder in a joint stock company. The shareholders of a joint stock company choose and control the company's managers, who act as agents of the shareholders. Crane & Bromberg, *supra* note 32, at 179 n.19. Business trusts, on

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enue, 296 U.S. 344, 56 S.Ct. 289, 80 L.Ed. 263 (1935), apposite. *Morrissey* involved the question of the taxing of a trust under existing statutory provisions. Diversity jurisdiction was not at issue. The Court held that the trust in *Morrissey* should be taxed in the same way as a corporation

footnote continued

the other hand, are non-statutory variations of traditional trusts. The Supreme Court, in *Hecht v. Malley*, 265 U.S. 144 (1924), defined a business trust as "an arrangement whereby property is conveyed to trustees, in accordance with the terms of an instrument of trust, to be held and managed for the benefit of such persons as may, from time to time, be the holders of transferable certificates issued by the trustees . . . ." *Id.* at 146. The business trust differs significantly from both the joint stock company and the general partnership in that the beneficiaries are not co-owners of the trust property. Rowley & Sive, *supra* note 32, at 632, 634. Legal title to trust property is vested in the trustees, while the beneficiaries have equitable title only.

[180] These powers are also comparable to those which limited partners may wield consistently with their limited partner status under more liberal limited partnership acts. *See Id.* at 415 & nn. 178 & 180.

under the statutory provision which defined a corporation for tax purposes as including " 'associations, joint-stock companies and insurance companies.' " The business trust there was held to be an unincorporated association.[7]

Neither *Bouligny* nor *Morrissey*, therefore, controls the present case.

This suit is, therefore, maintainable under diversity jurisdiction. We are, of course, aware that the Judicial Conference of the United States, by appropriate resolution, has requested that Congress change the law so that federal courts may be divested of diversity jurisdiction. However, until Congress amends the statute in this regard the federal courts are obliged to take those suits properly before them as diversity cases. This is such a case. Ac-

7. *Cf. Commissioner of Internal Revenue v. Horseshoe Lease Syndicate*, 5 Cir., 110 F.2d 748, 749, *cert. denied*, 311 U.S. 666, 61 S.Ct. 24, 85 L.Ed. 427 (1940); *see also Willowood Condominium Assn. v. HNC Realty Co.*, 5 Cir., 1976, 531 F.2d 1249, a case involving a REIT where diversity jurisdiction was held to be proper.

cordingly, the judgment of the district court dismissing the suit for lack of jurisdiction is reversed and the case is remanded to the district court for trial on the merits.

REVERSED AND REMANDED.

VANCE, Circuit Judge, dissenting.

The issue presented is whether for purposes of diversity jurisdiction the citizenship of a business trust is determined by the citizenship of its trustees, rather than that of its beneficiary shareholders. The majority has elected to resolve this question by undertaking a "real party in interest" analysis.[1] Concluding that the better view

1. The mere fact that legal title is vested in the trustees does not establish that they are the real parties. Nor is the fact that under the declaration of trust the trustees are the parties entitled to enforce the right dispositive of the issue. A party cannot unilaterally confer subject matter jurisdiction on a federal court by declaring who is to represent the trust in legal actions. This court should look beyond mere appellations to determine who is a real party in interest. *See Miller v. Perry*, 456 F.2d 63 (4th Cir. 1972). The primary function of categorizing a party as real party is to insure that an

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would base such determination on the citizenship of each of the business trust's beneficiary shareholders, I dissent. This approach comports with the rule announced in *United Steelworkers v. R. H. Bouligny, Inc.*, 382 U.S. 145, 86 S.Ct. 272, 15 L.Ed.2d 217 (1965): an unincorporated association has as its citizenship the domicile of each of its individual members.

The business trust is analogous to an unincorporated association. Unlike an ordinary trust, a business trust is primarily an investment vehicle whose object

footnote continued

judgment obtained by him will have its prop effect as res judicata. Advisory Committee Notes, 39 F.R.D. 85. Here, a judgment obtai ed by the trustees would have no greater pr clusive effect than a judgment secured by t beneficiary shareholders.

The majority's "real party in interest" anal sis necessitates ad hoc determinations a leads to divergent results. In some instances, trial judge may be forced to decide the meri of a case while determining the threshold juri dictional issue.

is not to hold and conserve particular property, with incidental powers, as in the traditional type of trusts, but to provide a medium for the conduct of a business and sharing its gains.

Morrissey v. Commissioner of Internal Revenue, 296 U.S. 344, 357, 56 S.Ct. 289, 295, 80 L.Ed. 263 (1935). Although *Morrissey* was only concerned with the tax status of a business trust, it does provide insight into its business character:

> What, then, are the salient features of a trust—when created and maintained as a medium for the carrying on of a business enterprise and sharing its gains—which may be regarded as making it analogous to a corporate organization? A corporation, as an entity, holds the title to the property embarked in the corporate undertaking. Trustees, as a continuing body with provision for succession, may afford a corresponding advantage during the existence of the trust. Corporate organization furnishes the opportunity for a centralized management through representatives of the members of the

corporation. The designation of trustees, who are charged with the conduct of an enterprise, who act "in much the same manner as directors," may provide a similar scheme, with corresponding effectiveness. Whether the trustees are named in the trust instrument with power to select successors, so as to constitute a self-perpetuating body, or are selected by, or with the advice of, those beneficially interested in the undertaking, centralization of management analogous to that of corporate activities may be achieved. An enterprise carried on by means of a trust may be secure from termination or interruption by the death of owners of beneficial interests and in this respect their interests are distinguished from those of partners and are akin to the interests of members of a corporation. And the trust type of organization facilitates, as does corporate organization, the transfer of beneficial interests without affecting the continuity of the enterprise, and also the introduction of large numbers of participants. The trust method also permits the

> limitation of the personal liability of participants to the property embarked in the undertaking.

Id. at 359, 56 S.Ct. at 296. The court then concluded that the business trust was sufficiently like a corporation that in reality it constituted an association rather than a traditional trust. *Id.* at 360, 56 S.Ct. 289.

The majority correctly notes that *Bouligny* addresses only the issue of an unincorporated association's domicile for diversity purposes when the association sues as an entity. It refuses, however, to apply *Bouligny* where, as here, individuals sue as representatives of the entity. It seems to me that such an approach honors form over substance [2] and ignores the underlying ra-

[2] Judge Hill, now a judge of this court, condemned the substitution of the trustees for the trust as named plaintiffs. As a district court judge he noted that:

> To say that diversity jurisdiction exists if the Trustees sue on behalf of the Trust, but does not exist if the Trust sues acting through the Trustees, is to honor form over substance and create problems where none now exist. If the Trustees may sue and create jurisdiction, then may one Trustee or two or fewer

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tionale of *Bouligny*:

> pleas for extension of the diversity jurisdiction to hitherto uncovered broad categories of litigants ought to be made to the Congress and not to the courts.

United Steelworkers v. R. H. Bouligny, Inc., 382 U.S. at 150–151, 86 S.Ct. at 275. If the decision in *Bouligny* were applied in this case, there is no alternative but to find that the citizenship of the beneficiary shareholders controls. This conclusion is in accord with *Riverside Memorial Mausoleum v. UMET Trust*, 581 F.2d 62 (3rd Cir. 1978)

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footnote continued

than all sue and establish jurisdiction? If the Trustees may sue on a promissory note, may they sue on all contracts? For torts? The court is reinforced in its conclusion by the tone and philosophy expressed by the United States Supreme Court in *United Steelworkers of America, AFL–CIO v. R. H. Bouligny, Inc.*, 382 U.S. 145, 86 S.Ct. 272, 15 L.Ed.2d 217 (1965) to the effect that if diversity jurisdiction is to be extended to hitherto broad categories of litigants it ought to be done by the Congress and not the courts.

***Chase Manhattan Mortgage and Realty Trust v. Pendley*, 405 F.Supp. 593 (N.D.Ga.1975).**

and is supported by the overwhelming weight of authority provided by district court holdings. *Lincoln Associates, Inc. v. Great American Mortgage Investors*, 415 F.Supp. 351 (N.D.Tex.1976); *Chase Manhattan Mortgage and Realty Trust v. Pendley*, 405 F.Supp. 593 (N.D.Ga.1975); *Jim Walter Investors v. Empire-Madison, Inc.*, 401 F.Supp. 425 (N.D.Ga.1975); *Larwin Mortgage Investors v. Riverdrive Mall, Inc.*, 392 F.Supp. 97 (S.D.Tex.1975); *Independence Mortgage Trust v. White*, 446 F.Supp. 120 (D.Or.1978); *National City Bank v. Fidelco Growth Investors*, 446 F.Supp. 124 (E.D.Pa. 1978); *Heck v. A. P. Ross Enterprises, Inc.*, 414 F.Supp. 971 (N.D.Ill.1976); *Carey v. U. S. Industries, Inc.*, 414 F.Supp. 794 (N.D.Ill. 1976).

UNITED STATES of America,
Plaintiff-Appellee,

v.

Larry EDDY and Raymond Daniel Eddy,
Defendants-Appellants.

No. 78–5527.

United States Court of Appeals,
Fifth Circuit.

June 18, 1979.

Defendants were convicted in the United States District Court for the Northern District of Alabama, Clarence W. Allgood, J., of two counts of unlawfully uttering and publishing as true checks drawn upon the United States Treasury, and they appealed. The Court of Appeals, Simpson, Circuit Judge, held that: (1) defendants could be charged as principals in uttering an instrument and convicted of aiding and abetting such offense even though words "aid and abet" did not appear in the indictment, and (2) evidence was not sufficient to support defendants' convictions either as principals

or as aiders and abetters.

Reversed.

1. Criminal Law ⇐80

Person can be charged as principal in uttering an instrument and be convicted of aiding and abetting such offense even though words "aid and abet" do not appear in the indictment. 18 U.S.C.A. §§ 2, 495.

2. Criminal Law ⇐1144.13(3)

In evaluating sufficiency of evidence to support conviction, Court of Appeals was required to view evidence adduced at trial in light most favorable to the Government.

3. Forgery ⇐44(3)

Where defendants' alleged guilt was predicated on government theory that they aided and abetted codefendant in uttering checks, elements which Government had burden of proving beyond reasonable doubt were not only those of offense of uttering, but also elements of offense of aiding and abetting. 18 U.S.C.A. §§ 2, 495.

4. Forgery ⇐16

Crime of uttering requires proof of putting forth a false writing, some attempt

to circulate a check by means of a fraudulent representation that it is genuine and also proof of defendant's intent to defraud. 18 U.S.C.A. § 495.

5. Criminal Law ⇐59(5)

Crime of aiding and abetting occurs if an individual associates himself with a criminal venture, participates in it as something he wishes to bring about, and seeks by his actions to make it succeed. 18 U.S.C.A. § 2.

6. Forgery ⇐44(3)

Evidence in prosecution for uttering as true checks drawn upon United States Treasury was not sufficient to support defendants' convictions either as principals or as aiders and abetters. 18 U.S.C.A. §§ 2, 495.

7. Criminal Law ⇐422(1)
Witnesses ⇐397

Testimony by Secret Service agent that codefendant told agent that codefendant received checks from defendants was not hearsay as it was not offered or admitted to prove truth of matter asserted but rather for limited purpose of impeaching codefend-